Nos. 87-363 and 87-364

In the Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

PUBLIC SERVICE COMMISSION OF NEW YORK, ET AL., PETITIONERS

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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QUESTIONS PRESENTED

1. Whether, as the Federal Energy Regulatory Commission determined, natural gas that is covered by two provisions of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.*—one of which sets a ceiling on prices, the other of which declares prices deregulated—must be treated as deregulated gas under the NGPA; or whether, instead, producers may choose, perhaps daily, the classification that, under current market conditions and their contracts, affords them the highest price.

2. Whether the Commission's ruling that most "new tight formation gas" under Section 107(c)(5) of the NGPA is automatically new gas under Section 102 or 103 of the Act is consistent with the Commission's authority under the NGPA.

PARTIES TO THE PROCEEDINGS

The petitioner in No. 87-363 is the Federal Energy Regulatory Commission. The respondents are Martin Exploration Management Company; Colorado Energy Corporation; Phillips Petroleum Company; Phillips Oil Company; Exxon Corporation; Shell Off-Shore, Inc.; Shell Western E & P, Inc.; Independent Oil & Gas Association of West Virginia; Amoco Production Company; Arco Oil & Gas Company; Ohio Oil and Gas Association; Independent Oil and Gas Association of West Virginia; Gulf Oil Corporation, successor to Chevron, U.S.A., Inc.; Union Oil Company of California; Champlin Petroleum Company; Pennzoil Company; Pennzoil Oil & Gas, Inc.; Pennzoil Producing Company; Placid Oil Company; Tennessee Gas Pipeline Company, a division of Tenneco, Inc.; Pacific Gas & Electric Company; Amoco Production Company; Transok, Inc.; Oklahoma Natural Gas Company, a division of Oneok, Inc.; Associated Gas Distributors; Public Service Commission of the State of New York; Pacific Lighting Gas Supply Company; Southern California Gas Company; Consolidated Gas Transmission Corporation; Panhandle Eastern Pipe Line Company; Cities Service Oil and Gas Corporation; Grace Petroleum Corporation; Valero Transmission Company; BHP Petroleum Company, Inc., successor to Monsanto Oil Company; Texas Eastern Transmission Corporation; Transwestern Pipeline Company; United Gas Pipe Line Company; United Texas Transmission Company; and Texas Gas Transmission Corporation.

The petitioners in No. 87-364 are the Public Service Commission of the State of New York; Consolidated Gas Transmission Corp.; Tennessee Gas Pipeline Co., a Division of Tenneco Inc.; Panhandle Eastern Pipe Line Co.; and Associated Gas Distributors. The respondents are all the other parties listed in the preceding paragraph.

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Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101 (1980) 4, 7

Pierce, *Natural Gas Regulation, Deregulation, and Contracts*, 68 Va. L. Rev. 63 (1982) 32

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a)[1] is reported, as modified, at 813 F.2d 1059. The order of the court of appeals modifying the original opinion (Pet. App. 29a-31a) is not separately reported. The notice of proposed rulemaking of the Federal Energy Regulatory Commission (FERC) (Pet. App. 34a-60a) is reported at 49 Fed. Reg. 36399. The opinion accompanying issuance of

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[1] "Pet. App." refers to the appendix to the petition in No. 87-363.

the final rule by FERC (Pet. App. 61a-103a) is reported at 49 Fed. Reg. 46874 and F.E.R.C. Stats. and Regs. para. 30,662. The FERC opinion denying rehearing in relevant part (Pet. App. 104a-126a) is reported at 49 Fed. Reg. 50637.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a-33a) was entered on March 9, 1987. Petitions for rehearing were denied, with modifications of the original decision (Pet. App. 29a-31a), on May 1, 1987. On July 22, 1987, Justice White extended the time for filing petitions for a writ of certiorari to and including August 31, 1987, and the petitions were filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 101(b)(5) of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3311(b)(5), provides:

> If any natural gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

Sections 107(c)(5), 121, and 122 of the NGPA, 15 U.S.C. 3317(c)(5), 3331, 3332, are set out in the appendix to the petition in No. 87-363 (Pet. App. 127a-131a).

Section 270.208 of 18 C.F.R. provides:

> First sales of natural gas that is deregulated natural gas as defined in § 272.103(a) is [*sic*] price deregulated and not subject to the maximum lawful prices of the NGPA, regardless of whether the gas also meets the criteria for some other category of gas subject to a maximum lawful price under Subtitle A of Title I of the NGPA.

STATEMENT

The Commission construed the Natural Gas Policy Act (NGPA or Act), in accordance with the Act's overall scheme of phased-in deregulation, to require that producers treat as deregulated any natural gas that is qualified for such status even if it is also qualified for price-regulated status. It also ruled that certain gas eligible for special pricing under Section 107(c)(5) of the Act, 15 U.S.C. 3317(c)(5), is automatically qualified for deregulated treatment under Section 102 or 103, 15 U.S.C. 3312, 3313. The court of appeals rejected the Commission's construction of the Act (Pet. App. 10a) and held that producers of natural gas could choose whatever statutory category affords them the highest price under their contracts and market conditions at any particular moment, even if the choice means returning deregulated gas to regulated status (*id.* at 17a, 30a). In explaining that holding, the court also rejected the Commission's ruling on Section 107(c)(5) gas.

A. *Statutory Background*

1. In 1938, Congress enacted the Natural Gas Act, 15 U.S.C. 717 *et seq.*, to govern certain aspects of the interstate natural gas industry. This Court held in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), that the Natural Gas act applied to producers' sales, at the wellhead, of gas for resale in interstate commerce. Accordingly, from the mid-1950s until 1978, the Federal Energy Regulatory Commission (and its predecessor, the Federal Power Commission) established just-and-reasonable ceiling rates for such producer sales, pursuant to Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. 717c, 717d. Those rates were based largely on the historical costs of production. See, *e.g.*, H.R. Rep. 95-543, 95th Cong., 1st Sess. Pt. 2, at 386 (1977); 121 Cong. Rec. 31982 (1975) (Sen. Stevenson).

At least by the early 1970s, the federally established rates were lower than the prices producers could command for gas sold in unregulated intrastate markets. See *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 327-331 (1983). It quickly "became clear that the existing regulatory structure was inadequate" (Pet. App. 3a). The increasing costs of alternative fuels and the benefits of natural gas for environmental reasons generally raised demand for natural gas; and the combination of price ceilings applicable to interstate sales under the Natural Gas Act and the absence of similar constraints on intrastate sales artificially reduced supply and inflated demand in the interstate market. *Ibid.*; Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 Harv. L. Rev. 941 (1973); Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101, 106-112 (1980). The result of this imbalance in supply and demand was the emergence of a chronic natural gas shortage. See *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 626 (1972).

Both houses in the 94th Congress (1975-1976) passed bills addressed to the problem. Both recognized that regulated prices in the interstate market were "unnaturally low" (121 Cong. Rec. 31201 (1975) (Sen. Glenn); *id.* at 30935 (Sen. Bayh), 31369 (Sen. Stevenson)) and that the different treatment of the interstate and intrastate markets was a substantial cause of the shortages in the interstate market (see, *e.g.*, H.R. Rep. 94-732, 94th Cong., 1st Sess. 5-8, 48, 54 (1975); 121 Cong. Rec. 31223 (1975) (Sen. Fannin)). The two houses, however, adopted contrary approaches to the problem.

The Senate, responding to numerous calls for deregulation of prices led by the Senators from the gas-producing states (see, *e.g.*, 121 Cong. Rec. 30735-30737 (1975) (Sen. Bartlett of Oklahoma, Sen. Long of Louisiana); *id.* at 30898 (Sen. Bartlett), 30908 (Sen. Bentsen of Texas),

30914 (Sen. Tunney of California), 31230-31234 (bill proposed by Sen. Pearson of Kansas and Sen. Bentsen); *id.* at 31223 (Sen. Fannin of Arizona)), passed a bill (S. 2310, 94th Cong., 1st Sess. (1975)) that generally would have deregulated producer sales within one year for new onshore gas and within five years for new offshore gas (see 121 Cong. Rec. 33655-33659 (1975)). In so doing, the Senate refused to adopt proposals to extend price regulation from the interstate to intrastate markets (*id.* at 31370-31374, 31983, 32299, 33636). The House took roughly the opposite approach. It rejected a deregulation proposal (122 Cong. Rec. 2645 (1976)) and passed a bill (H.R. 9464, 94th Cong., 2d Sess. (1976)) that would have deregulated certain sales by small "independent" producers, extended federal price regulation to intrastate markets, and introduced production incentives into the setting of federal ceilings (122 Cong. Rec. 2385-2388 (1976)). Both the House and Senate bills died in the 94th Congress.[2]

2. Against that background, in 1977, during the first session of the 95th Congress, the House and Senate again each passed bills designed to address the problem. Again

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[2] Attempts by producers to obtain partial or complete deregulation were twice before almost successful. In 1950, following this Court's decision in *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682 (1947), Congress passed a bill (H.R. 1758, 81st Cong., 2d Sess.) that would have deregulated producer sales to interstate pipelines with which the producer was not affiliated. President Truman vetoed the bill, citing the need for continued regulation (see 1950 Pub. Papers 257 (Apr. 15, 1950)). In 1956, in response to this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, *supra*, Congress narrowly passed a bill (H.R. 6645, 84th Cong., 2d Sess.) that would have deregulated all producer sales (see 101 Cong. Rec. 11859-11861 (1955) (describing bill)). President Eisenhower vetoed the bill, explaining that, although he was in sympathy with its objectives, certain producers had engaged in ethically questionable practices in urging at least one member of Congress to vote for the bill (see 1956 Pub. Papers 256-257 (Feb. 17, 1956)).

both houses recognized that interstate gas had been "underpriced" (H.R. Rep. 95-543, *supra*, at 7; S. Rep. 95-436, 95th Cong., 1st Sess. 20 (1977); 123 Cong. Rec. 29783 (1977) (Sen. Hansen); *id.* at 29786 (Sen. Pearson)) and that the distinction between the interstate and intrastate markets should be broken down (see, *e.g.*, H.R. Rep. 95-543, *supra*, at 10, 19, 392; S. Rep. 95-436, *supra*, at 2, 21). And again, the debate was between those favoring deregulation and those favoring extension of federal price ceilings into the intrastate markets (see H.R. Rep. 95-543, *supra*, at 391-392), with the House adopting the latter view and the Senate adopting a bill that moved toward deregulation.

The House bill (H.R. 8444, 95th Cong., 1st Sess. (1977)), part of a broader National Energy Act proposed by President Carter, would have extended regulatory controls by imposing uniform price regulation, at levels intended to encourage production, on all natural gas, interstate and intrastate (123 Cong. Rec. 27244-27245 (1977)). See H.R. Rep. 95-543, *supra*, at 10, 19, 392-393; see also H.R. Conf. Rep. 95-1752, 95th Cong., 2d Sess. 67 (1978) (describing House bill). In the course of considering the bill, the House defeated a proposal that would have deregulated new onshore gas immediately and new offshore gas in 1982 (123 Cong. Rec. 26448-26450 (1977) (Brown amendment); *id.* at 25914 (describing amendment), 26452 (same), 26482-26483 (amendment defeated)). The Senate took a "significantly different approach" (H.R. Conf. Rep. 95-1752, *supra*, at 68). Its bill (S. 2104, 95th Cong., 1st Sess. (1977)) would have left intrastate gas unregulated and would have deregulated new onshore natural gas in two years and new offshore gas in 1982, with certain price controls in the interim (123 Cong. Rec. 32306 (1977)). See *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. at 331-332; H.R. Conf. Rep. 95-1752, *supra*, at 68. The Senate passed this bill in lieu of

the proposed Committee bill, which was similar to the House bill and did not provide for deregulation (see S. Rep. 95-436, *supra*, at 2-5)), and in lieu of a proposal (made initially by the sponsors of the ultimately enacted bill) for faster deregulation of new onshore gas (see 123 Cong. Rec. 29784-29786, 31163-31165 (1977)).

The conflict between the houses went to a Conference Committee, which proposed an entirely new bill roughly one year later (H.R. 5289, 95th Cong., 2d Sess. (1978); H.R. Conf. Rep. 95-1752, 95th Cong., 2d Sess. (1978)). The conference bill struck a compromise between the House's proposed increased regulation and the Senate's proposal for deregulation of new gas within two to five years (see H.R. Conf. Rep. 95-1752, *supra*, at 67-68; 124 Cong. Rec. 38361 (1978) (remarks of Rep. Dingell); *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. at 331). The bill broke down the distinction between interstate and intrastate gas and brought all gas under a single " 'national market price regulatory scheme.' " *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 421 (1986) (quoting Haase, *The Federal Role in Implementing the Natural Gas Policy Act of 1978*, 16 Hous. L. Rev. 1067, 1079 (1979)). It removed large quantities of gas from the entire regulatory scheme of the Natural Gas Act, and with respect to price in particular, it replaced Commission-set ceilings (at "just and reasonable" rates) with ceilings generally set directly by statute, several designed to provide incentives for new production. The bill also mandated "deregulation of most categories of natural gas" (H.R. Conf. Rep. 95-1752, *supra*, at 68) after transition periods of up to nine years. See Note, *supra*, 59 Tex. L. Rev. at 116. Enacted as the NGPA, the bill thus "comprehensively and dramatically changed the method of pricing natural gas produced in the United States" (*Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. at 322).

3. Title I of the NGPA creates the scheme of "[p]hased deregulation" (124 Cong. Rec. 38361 (1978) (Rep. Dingell)) in two stages. Subtitle A (NGPA §§ 101-110, 15 U.S.C. 3311-3320) defines numerous categories of natural gas and establishes (or, in a few exceptional cases, permits the Commission to set) a gradually increasing "maximum lawful price" for wellhead "first sale[s]" of gas in each category.[3] Subtitle B (NGPA §§ 121-123, 15 U.S.C 3331-3333) then provides for the removal of certain of those ceilings after periods ranging from several months to nine years.

More particularly, the categories of natural gas defined by Subtitle A,[4] aside from a catch-all residual category (NGPA § 109, 15 U.S.C. 3319), fall roughly into three groups. First, and of primary importance to these cases, four provisions set prices (or, in one instance, authorize the Commission to do so) that are designed to furnish incentives for new production: Sections 102 and 103, 15 U.S.C. 3312, 3313, cover certain new natural gas[5]; Section 107, 15 U.S.C. 3317, covers certain "high-cost" natural gas[6]; Section 108, 15 U.S.C. 3318, covers gas from certain

[3] A "first sale" is most often, but not exclusively, a sale by the producer of the natural gas (NGPA § 2(21), 15 U.S.C. 3301(21)).

[4] The category-defining sections are Sections 102-109, 15 U.S.C. 3312-3319. Section 101, 15 U.S.C. 3311, defines the annual inflation adjustment factor and other "[r]ules of general application" relevant to the remainder of the Act. Section 110, 15 U.S.C. 3320, concerns the treatment of state severance taxes and certain production-related costs.

[5] Section 102, 15 U.S.C. 3312, covers gas from a new reservoir, from certain Outer Continental Shelf leases, or from a new well drilled sufficiently far from certain existing "marker" wells. Section 103, 15 U.S.C. 3313, covers certain new onshore production wells.

[6] Section 107, 15 U.S.C. 3317, defines four categories of high-cost gas (Subsections (c)(1) through (4)) and allows the Commission to designate other gas that is especially costly or risky to produce (Subsection (c)(5)).

low-producing "stripper" wells.[7] Second, two provisions (§§ 104, 106(a), 15 U.S.C. 3314, 3316(a)) cover "old" interstate gas – gas dedicated to interstate commerce prior to the NGPA's effective date or sold under "rollover" interstate contracts; those provisions set non-incentive, consumer-protective price ceilings based on the Natural Gas Act. Third, two provisions (§§ 105 and 106(b), 15 U.S.C. 3315, 3316(b)) cover "old" intrastate gas, defined analogously to "old" interstate gas, and set price ceilings tied to those for "new" Section 102 gas.

The central provision of Subtitle B is Section 121, 15 U.S.C. 3331, which mandates a three-stage elimination of price ceilings for certain of the categories of natural gas specified in Subtitle A. First, pursuant to Section 121(b), 15 U.S.C. 3331(b), price ceilings were removed on November 1, 1979, for the "high-cost" gas defined by Section 107(c)(1)-(4), 15 U.S.C. 3317(c)(1)-(4), which was the gas Congress believed to be most in need of immediate production incentives (see 124 Cong. Rec. 28633 (1978) (Sen. Jackson)). Next, and most important for these cases, pursuant to Section 121(a), 15 U.S.C. 3331(a), price ceilings were eliminated on January 1, 1985, for certain of the incentive-priced gas qualifying under Sections 102 and 103 ("new" gas) and under Sections 105 and 106(b) ("old" intrastate gas), 15 U.S.C. 3312, 3313, 3315, 3316(b).[8] Finally, pursuant to Section 121(c), 15 U.S.C. 3331(c), certain other "new" Section 103 gas was deregulated on July 1, 1987.[9]

[7] A "stripper" well is one that produces 60 Mcf or less per day. See NGPA § 108(b), 15 U.S.C. 3318(b); NGPA § 2(29), 15 U.S.C. 3301(29) (defining "Mcf").

[8] Certain "old" intrastate gas covered by Section 105 continues to be subject to price ceilings. See NGPA § 121(e), 15 U.S.C. 3331(e).

[9] Section 121(a), 15 U.S.C. 3331(a), states: "Subject to the reimposition of price controls as provided in section 122, the provisions of subtitle A respecting the maximum lawful price for the first sale of

Some gas, including "old" interstate gas, is never deregulated under the NGPA. Most notably for purposes of these cases, certain "high-cost" gas (§ 107(c)(5), 15 U.S.C. 3317(c)(5)) and "stripper well" gas (§ 108, 15 U.S.C. 3318) remains subject to price ceilings. In addition, the deregulation process established by Section 121 could have been delayed. Section 122, 15 U.S.C. 3332, gives the President and Congress an option for a one-time 18-month reimposition of price controls. That option expired on June 30, 1987, without having been invoked.

4. The categories defined by the provisions of Subtitle A overlap: substantial quantities of natural gas can qualify simultaneously under more than one provision. What is important for these cases is that, in addition to the overlap of several regulated categories, there is overlap between categories that remain subject to price ceilings (regulated gas) and categories that are free from any ceiling (deregulated gas). For example, the categories defined by Sections 107(c)(5) and 108, 15 U.S.C. 3317(c)(5), 3318 (certain high-cost natural gas and stripper-well gas), which remain subject to price ceilings, overlap significantly with the new-gas categories defined by Sections 102 and 103, 15 U.S.C. 3312, 3313, which are now deregulated. See Pet. App. 43a, 73a.[10]

each of the following categories of natural gas shall, except as provided in subsections (d) and (e), cease to apply effective January 1, 1985 * * *." Subsections (b) and (c) are worded in similar fashion.

Subsection (d) is not relevant to these cases. Subsection (e) places a ceiling on certain gas (§ 105(b)(3), 15 U.S.C. 3315(b)(3)) that otherwise would be deregulated under Subsection (a). See note 32, *infra*.

[10] Pursuant to NGPA § 503, 15 U.S.C. 3413, producers must obtain rulings from certain state or federal "jurisdictional" agencies, subject to Commission review, in order to "qualify" their gas for sale in particular categories. Obtaining two qualifications is permitted. See 124 Cong. Rec. 38364 (1978) (explanatory statement on conference bill by Reps. Dingell, Staggers, Ashley, Eckhardt, and Wilson).

The Commission's regulations implementing the Section 503 requirement (18 C.F.R. Pt. 274) designate different jurisdictional agencies for gas produced from wells on the Outer Continental Shelf, on federal lands within a state, and on other lands within a state (18 C.F.R. 274.501). The regulations also set forth rules governing the filings producers must make with the jurisdictional agencies, and those rules vary according to the designation sought by the producer (18 C.F.R. 274.201-274.208).

Recognizing that the Subtitle A categories overlap, Congress included in the NGPA a provision addressed to the general question of gas qualifying in more than one category. Section 101(b), 15 U.S.C. 3311(b), sets forth "Rules of general application." Section 101(b)(5) states:

> Sales qualifying under more than one provision.— If any natural gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.[11]

B. *The Commission's Rulings*

As the principal deregulation date (January 1, 1985) approached, the Commission found it necessary to consider the proper treatment of gas that is qualified for both regulated and deregulated treatment. At the time the NGPA was enacted in 1978, Congress—indeed, virtually all participants in the legislative process—assumed that market prices would be higher than the statutory ceilings. See Pet. App. 22a-23a. It was, accordingly, also clearly assumed that producers would prefer deregulated treat-

[11] The Conference Report explains (H.R. Conf. Rep. 95-1752, *supra*, at 74):

> The conference agreement provides that if natural gas qualifies under more than one price category, the provisions [*sic*] that permit the seller to obtain the highest price applies. If a seller wishes to change the category under which production from a given well qualifies, he must apply to the appropriate State or Federal agency with authority to make determinations under section 503.

ment to the ceilings set in the statute. By the end of 1984, market prices had fallen drastically, and the 1978 assumptions about producer preferences had been reversed. See *ibid.* Consequently, many producers preferred regulated to deregulated treatment for gas that might qualify for both. See *id.* at 73a-78a.[12]

In September 1984, the Commission proposed a regulation to determine the legal treatment of gas that is qualified for both deregulated and regulated treatment (dual-qualified regulated-deregulated gas).[13] Pet. App. 43a-45a. After receipt of comments, the Commission, in November 1984, issued a final rule establishing that, as of

[12] Many producers have contracts that fix the price of their gas far into the future, often providing alternative prices depending on the regulatory classification of the gas and leaving it up to government action (statute, regulation, order) to determine the classification of the gas. The price fixed for regulated gas is commonly at or near the maximum lawful price. By contrast, the price for gas treated as not subject to a price ceiling is typically based on market prices. See D. Zillman & L. Lattman, *Energy Law* 533 (1983) (contract provisions "often allow prices to increase to match the highest price paid for gas in the area or to return the highest price allowed by government regulation"). As a result, when deregulated prices are below the statutory ceilings, many producers wish to have their gas treated as falling within one of the still-regulated categories, so that they can collect a higher contract price.

[13] The Commission did not address itself to all gas that could conceivably be qualified for sale in a particular category by the relevant state or federal jurisdictional agency. Rather, of gas that requires agency qualification for sale in a particular category, the Commission addressed only gas that actually is qualified in multiple categories by the relevant agency. The Commission also considered certain deregulated gas that need not receive an agency qualification. See 18 C.F.R. 270.208, referring to 18 C.F.R. 272.103(a), which defines deregulated gas to include only gas is actually qualified as such by the relevant jurisdictional agency and certain "old" intrastate gas, which does not require agency qualification.

January 1, 1985, gas that is qualified for a category not subject to any price ceiling would be treated as deregulated and could be sold at any price the market would bear, even if the gas is also qualified for one of the categories still subject to statutory price ceilings. *Id.* at 73a-82a; see page 2, *supra* (quoting rule, 18 C.F.R. 270.208). Noting that market prices were then below statutory ceiling prices, that "Congress may not have anticipated such a situation" (Pet. App. 75a), and that many producers would therefore prefer to remain subject to price regulation, the Commission construed the NGPA to mandate deregulation.[14]

The Commission based this conclusion, first, on Section 121 of the NGPA, 15 U.S.C. 3331, which by its terms mandates the removal of Subtitle A's price ceilings for the specified categories of natural gas. The Commission read the provision to embody Congress's mandate to "phase from regulated ceiling prices in the short term to market clearing prices in the long term" (Pet. App. 76a). See *id.* at 75a-77a. The Commission pointed out (*id.* at 74a; see also *id.* at 43a) that "the overall scheme envisioned by Congress when it enacted the NGPA [was] to provide incentive prices to encourage exploration and development of new reserves in the short-term, and to gradually substitute market forces for regulated prices by phasing in deregulation in 1985 and 1987."

The Commission likewise construed Section 101(b)(5), 15 U.S.C. 3311(b)(5), to require deregulated treatment of gas that falls under both a provision setting a ceiling price and one eliminating any legal ceiling price (Pet. App. 78a-79a).[15] The Commission concluded that Section

[14] The Commission noted that, in 1979 and 1980, when market conditions were different, several producers, including some of respondents, argued in favor of the conclusion adopted by the Commission here. Pet. App. 74a & n.10.

[15] The Commission stated that the provision was "helpful, but not dispositive" of the issue (Pet. App. 78a).

101(b)(5), in declaring applicable whichever of the competing provisions "could result in the highest price," means that "the deregulated price, which always *could* result in a price *higher* than a regulated price, prevails" because "there always exists at least the potential for the parties to negotiate a contract above the old regulated ceiling price" (Pet. App. 78a-79a (emphasis in original)). The Commission further explained on rehearing (*id.* at 111a (footnote omitted; emphasis in original)): "Without question, a deregulated price *could* always result in a price higher than a regulated price which is subject to a ceiling price; whether the *contract* allows the producer to collect a price higher than regulated price is a contractual issue, not an issue raised by the deregulation scheme of the NGPA."

In addition to, and in the course of explaining, its ruling on the treatment of dual-qualified regulated-deregulated gas, the Commission specifically addressed itself to the proper treatment of certain so-called "new tight formation" gas eligible for special high-cost-gas pricing under Section 107(c)(5), 15 U.S.C. 3317(c)(5). Except for gas from certain old Outer Continental Shelf leases (see § 102(d), 15 U.S.C. 3312(d)),[16] "new tight formation" gas, under the Commission's defining regulation (18 C.F.R. 271.703(b)), "is new natural gas, (as defined in section 102(c)), * * * or gas produced through a new onshore production well (as defined in section 103(c))." Moreover, as the Commission pointed out (Pet. App. 81a-82a), "to qualify as new tight-formation gas under section 107(c)(5), a producer must file the same information, in addition to other information, that would be filed to qualify as a section 102 or 103 determination" (see 18 C.F.R. 274.205(e)(1)(i)(A) and (B)). Because a determination that a particular quantity of gas qualifies as new tight formation gas under Section 107(c)(5) therefore necessarily includes a determination that it meets the requirements of

[16] The Commission did not address such gas in this proceeding.

Section 102 or 103, the Commission ruled that a state or federal jurisdictional agency's qualification of gas as new tight formation gas is automatically a qualification under Section 102 or 103, even if the state or federal jurisdictional agency does not expressly style its ruling as such. See Pet. App. 81a-82a, 114a-116a. Under Section 121(a), 15 U.S.C. 3331(a), therefore, such gas was deregulated on January 1, 1985. Pet. App. 82a, 116a.

C. *The Court of Appeals' Decision*

On petitions for review filed by numerous producers under Section 506 of the NGPA, 15 U.S.C. 3416, the court of appeals rejected the Commission's interpretation of Sections 101(b)(5) and 121, 15 U.S.C. 3311(b)(5), 3331. Pet. App. 1a-24a. The court first concluded that Section 121 is ambiguous, because, although it commands the elimination of price ceilings for the listed categories of natural gas, it does not explicitly address the subject of deregulated gas that also qualifies for a regulated category (Pet. App. 10a-11a). The court then stated that, despite the ambiguity, it could not defer to the Commission's interpretation, as it ordinarily would, because "Congress anticipated precisely this question in § 101(b)(5)" (Pet. App. 11a), and the Commission's ruling was contrary to the "unambiguous language" of that provision (*id.* at 13a).

After concluding that Section 101(b)(5) applies to all dual-qualified gas, even if one of the overlapping categories is deregulated,[17] the court held that Section

[17] The court reasoned that Section 101(b)(5), in using the word "exemption" when referring to provisions "providing for any maximum lawful price or for any exemption from such a price," applies to statutory provisions declaring gas prices deregulated. The court rejected the suggestion that the term "exemption" applies only to the provisions (§§ 104(b)(2), 106(c), 109(b)(2), 15 U.S.C. 3314(b)(2), 3316(c), 3319(b)(2)) that grant the Commission authority to set special "just and reasonable" ceilings higher than statutory ceilings for par-

101(b)(5) expressly and unambiguously gives producers the right to choose, at any particular moment, whatever category, regulated or deregulated, provides the highest price under their contracts. Pet. App. 16a-17a; *id.* at 30a (modification on petitions for rehearing). The court rejected the Commission's construction of the "could result" language of Section 101(b)(5), reasoning that, while "the price of deregulated natural gas in an open market 'could' theoretically reach infinity" (*id.* at 15a), at least certain price ceilings for regulated gas similarly "could" rise without limit.[18] It stated that the Commission's reading of Section 101(b)(5) "considers only the theoretical possibilities [and] renders § 101(b)(5) meaningless" (Pet. App. 16a). The court concluded that Section 101(b)(5) "requires a comparison of the applicable price for each category at a particular moment" based on producers' actual contracts, rather than a comparison of ceiling prices, if any, under the applicable provisions (Pet. App. 16a). Under Section 101(b)(5), then, the highest price governs (Pet. App. 16a-17a).

In support of that conclusion, the court indicated that it read the NGPA, informed by several congressional floor statements, as granting a producer the right to "select the category or categories for which he or she desires to qualify particular gas" (Pet. App. 19a). See *id.* at 18a-19a (citing 124 Cong. Rec. 29109 (1978) (Sen. Jackson); *id.* at

ticular categories. The court pointed out that another of the "[r]ules of general application" – namely, Section 101(b)(9), 15 U.S.C. 3311(b)(9) – uses "exempted" and "exemption" to refer to provisions that deregulate gas prices (Pet. App. 14a-15a).

[18] Observing that the Commission could set price ceilings at "just and reasonable" rates under certain regulated-price provisions (§§ 104(b)(2), 106(c), 109(b)(2), 15 U.S.C. 3314(b)(2), 3316(c), 3319(b)(2)) and that the Subtitle A ceiling prices generally rise with inflation, the court reasoned: "The price of regulated gas is therefore certain to rise, and is capable of reaching an indefinite 'just and reasonable' rate." Pet. App. 15a-16a.

38363-38364 (Rep. Dingell)). This principle of producer choice of what categories to qualify gas in, the court reasoned, is inconsistent with the Commission's conclusion that a producer cannot choose a regulated category for gas that is already qualified for a deregulated category. The court also cited this principle as the basis for rejecting the Commission's ruling that most "new tight formation" gas under Section 107(c)(5), 15 U.S.C. 3317(c)(5), is automatically qualified under Section 102(c) or 103, 15 U.S.C. 3312(c), 3313, and hence deregulated. Pet. App. 18a-19a. Even if such gas in fact meets the requirements of Section 102(c) or 103, the court ruled, producers are entitled to "a choice as to which category or categories for which they seek to qualify particular gas" (Pet. App. 18a).[19]

The court rejected the Commission's reliance on phased deregulation as the overall plan of the NGPA. Phased deregulation is not the sole means chosen by Congress to achieve the ultimate statutory aim of ensuring adequate supplies at fair prices, the court stated (Pet. App. 20a). The court briefly mentioned a few statements from the NGPA's legislative history (*id.* at 21a-22a n.15), but it

[19] The court indicated its belief (Pet. App. 18a & n.12) that so-called "recompletion tight formation" gas is an exception to the rule that "new tight formation" gas always in fact meets the requirements under Section 102 or 103, 15 U.S.C. 3312, 3313. In fact, contrary to that suggestion (and to the same suggestion in our petition (at 10 n.15, 12 n.18)), "recompletion - tight formation" gas (18 C.F.R. 271.703(b)(3)) is not included within the definition of "new tight formation" gas (18 C.F.R. 271.703(b)(2)), so it does not present the suggested exception.

It is not clear whether the court of appeals understood the new tight formation gas issue as separate and distinct from the general dual-qualification issue. On considering petitions for rehearing, the court clarified (Pet. App. 30a) that its decision "does not interfere with FERC's continuing authority to modify the criteria that establish which types of gas qualify under § 107(c)(5)."

noted that the cited passages had "somewhat contradictory" implications (*ibid.*). The court also recognized that "Congress did not expect that natural gas prices would fall" and hence did not anticipate the situation presented to the Commission in 1984 and today—that of producers wishing to remain under regulation (*id.* at 22a-23a). The court of appeals further recognized that, under its view, Section 101(b)(5) "can have the unanticipated effect of operating as a price floor for producers" (Pet. App. 23a). Nevertheless, the court felt itself bound by "the intent of Congress as evidenced in the unambiguous language [of the NGPA]" (*id.* at 24a).

SUMMARY OF ARGUMENT

I. The court of appeals' reading of Section 101(b)(5) of the NGPA is inconsistent with the language, policies, and history of the NGPA. The Commission's reading of Section 101(b)(5) is correct and is entitled to deference.

A. Section 101(b)(5) declares that when a particular quantity of gas falls under two applicable NGPA pricing provisions, "the provision which could result in the highest price" shall apply. Read naturally, those words call for a simple comparison between the highest price permitted by one provision and the highest price permitted by the other: the higher the applicable ceiling, the higher the price that "could result" under the provision. All producers whose gas falls under both provisions are governed by the same higher-ceiling provision. When one of the applicable provisions sets no legal ceiling (*i.e.*, deregulates the price of the gas), that provision applies because it permits producers to contract to sell their gas unconstrained by any price ceilings.

Contrary to the court of appeals' reading, Section 101(b)(5) does not call for a comparison of the prices that happen to be specified in particular producers' contracts. The section makes no reference to contract prices; it determines which statutory "provision" applies in the case of overlap, based on the prices that "could result," not on the prices that in fact result. Moreover, nothing in Section 101(b)(5) suggests that it contemplates, as the court of appeals' reading does, that two producers with gas falling under the same two provisions could be subject to different NGPA pricing provisions, depending on their particular contract prices.

Reading Section 101(b)(5) as focusing on contract prices would be inconsistent with the approach to price regulation taken by the NGPA as a whole. The NGPA sets only ceiling prices and otherwise leaves the establishment of actual sale prices to private decision. Section 101(b)(5) should not be read, as the court of appeals read it, as an anomalous provision that is concerned with the private contract prices at which particular gas is sold, rather than merely determining what upper limit, if any, constrains the contract price.

B. The error of the court of appeals' reading of Section 101(b)(5) is especially stark as it applies to gas that is qualified in both regulated and deregulated categories. The court's ruling, by allowing producers to choose regulated treatment for gas that otherwise would be deregulated and sold at a lower price, substitutes a permanent producer-assistance policy for the policy of phased deregulation leading to market control of prices that Congress adopted in the NGPA.

In addition, the legislative history of the NGPA demonstrates unmistakably that Congress as a whole, and in fact every participant in the legislative process, would have rejected the suggestion that producers could receive higher prices than deregulation would afford them. Deregulation was the most favorable position toward producers that was even discussed. The result reached by the court of appeals thus lies outside the terms of the debate leading up to the NGPA's enactment.

II. The court of appeals also erred in rejecting the Commission's ruling that most "new tight formation" gas is automatically qualified as deregulated gas under Section 102(c) or 103, 15 U.S.C. 3312(c), 3313. The Commission has broad regulatory authority under the NGPA and, in particular, is empowered to define the categories of "high-cost" gas deserving of special pricing under Section 107(c)(5), 15 U.S.C. 3317(c)(5). The Commission's ruling on new tight formation gas is a reasonable means of enforcing the plain terms of its definition of such gas, which states that new tight formation gas "is" gas as defined in Section 102(c) or 103. Moreover, the Commission's ruling is the legal equivalent of a change in the definition of new tight formation gas so as to exclude gas qualifying under Section 102(c) or 103. Such a change of definition would serve the purpose of ensuring, consistent with the legislative history of the statute, that producers do not receive more favorable treatment than deregulation would afford them. The Commission's means of achieving precisely the same result should therefore be upheld.

ARGUMENT

I. THE COMMISSION CORRECTLY CONCLUDED THAT SECTION 101(b)(5) OF THE NGPA REQUIRES THE DEREGULATION OF NATURAL GAS THAT IS QUALIFIED FOR BOTH REGULATED AND DEREGULATED TREATMENT

The court of appeals held that Section 101(b)(5) of the NGPA permits a natural gas producer whose gas is qualified in more than one NGPA category to compare the prices its contracts allow it to charge at a given time for gas in each category and select the highest price. The court therefore rejected the conclusion of the Commission, the agency charged with administering the NGPA, that Section 101(b)(5) places such gas in whichever of the categories imposes the highest legal ceiling, without regard to individual producer contracts—so that, when one ap-

plicable category places no upper limit on the price a producer may charge, that category applies, and the gas is deregulated.[20] The court of appeals' rejection of the Commission's position is erroneous. It is contrary to the language of Section 101(b)(5), to the NGPA's general approach to regulation (which focuses on ceiling prices only, and not on producers' contract prices), to the statute's overall plan of phased deregulation, and to the legislative history, which precludes any reading of the NGPA, such as the court of appeals' reading, that would allow producers to charge higher-than-market prices.

A. When Gas Is Qualified Under Two NGPA Pricing Provisions, Section 101(b)(5) Determines Which Provision Is Applicable Based On A Comparison Of The Ceiling Prices, If Any, Set Under Those Provisions, Not A Comparison Of Particular Producers' Contract Prices

To begin, as one must, with the language of the statute (*e.g.*, *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)), Section 101(b)(5) states that, when several NGPA provisions apply to a particular quantity of gas, "the provision which could result in the highest price shall be applicable." Although this may not be "a provision in which Congress' limpid prose puts an end to all dispute," that does not mean "that all interpretations are equally plausible" (*Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, No. 86-473 (Dec. 1, 1987), slip op. 6). Rather, like the provision at issue in *Gwaltney of Smithfield, Ltd.*, Section 101(b)(5) has a single "most natural reading."

That reading, as the Commission concluded, calls for a comparison of the maximum prices allowed by the several

[20] We do not renew the argument we made in the court of appeals that Section 101(b)(5) does not apply to dual-qualified regulated-deregulated gas. We note, however, that it is by no means clear that Congress specifically contemplated that the provision would apply to such gas.

provisions applicable to a given quantity of natural gas. If natural gas is subject to two or more provisions of the NGPA, the "provision which could result in the highest price" is the provision that, solely with reference to the limits imposed under the NGPA, permits the highest price. See also H.R. Conf. Rep. 95-1752, *supra*, at 74 ("the provisions that permit the seller to obtain the highest price"). In the case of gas falling under two provisions that set ceiling prices, the one with the higher ceiling applies—and does so for all producers whose gas falls under those two provisions. Where one of several applicable provisions sets a ceiling price and another declares that there is no such ceiling, the deregulating provision is the one that "could result" in the highest price.

The court of appeals rejected the Commission's view that Section 101(b)(5) calls for the comparison only of ceiling prices; the court did not dispute that, if that reading is correct, it requires that gas qualified in both a regulated and deregulated category be deregulated. In the court of appeals' view, Section 101(b)(5) in every case calls for a comparison, not of applicable statutory ceilings, but of the prices particular producers have included in their contracts.[21] That is so even for gas that falls under two provisions that set ceiling prices: in that case, under the court's reading, Section 101(b)(5) requires the comparison of particular producers' contract prices, not of the ceiling prices under the applicable provisions, and so Section 101(b)(5) could require the application of different provisions for different producers, depending on what prices each happens to have included in its contracts. This view is inconsistent with the language of Section 101(b)(5) and with the approach to price regulation taken by Title I of the NGPA

[21] See, *e.g.*, Pet. App. 16a-17a n.11 (emphasis added) ("the *contractual* price for regulated gas in the regulated category is to be compared with the *contractual* price for deregulated gas in the deregulated category").

as a whole, and the Commission's view that Section 101(b)(5) focuses exclusively on ceiling prices is clearly the better reading.

1. There are in the language of Section 101(b)(5) itself several decisive pieces of evidence supporting the Commission's reading. First, Section 101(b)(5) expressly calls for a comparison, simply, of NGPA "provisions." The statute contains no hint that the called-for comparison requires any reference to "contracts" or any other fact outside the terms of the price-setting provisions. Nor does it contain any reference to particular "producers" or any other hint that, as the court of appeals would allow, the overlap of the same two provisions could be resolved differently for different producers. Rather, it requires the comparison of the highest prices legally permitted under each applicable provision, not the prices particular producers happened to have included in their contracts.

Contrary to the court of appeals' reading, the result of the Section 101(b)(5) comparison is not to determine the price a producer must charge. What is determined is simply "the provision" that "shall be applicable" (Section 101(b)(5)). As was explained in the "comprehensive explanatory statement" prepared by five House conferees (Reps. Staggers, Ashley, Eckhardt, Wilson, and Dingell) in urging the House to adopt the conference bill (124 Cong. Rec. 38363 (1978) (emphasis added)), "if more than one ceiling price rule appears applicable," "[w]hichever ceiling price could result in the highest price is the *applicable maximum* lawful price." Section 101(b)(5) determines only the applicable ceiling price, and it does so for all producers whose gas happens to fall under the same two provisions.

Congress's use of the statutory phrase "could result" confirms the irrelevance of producers' contract prices to the comparison called for by Section 101(b)(5). Especially in a statutory provision that does not refer to producers or

contracts, that phrase can only call for an inquiry into the range of prices that a particular provision of the NGPA permits producers to charge. The producer respondents, in their effort to support the court of appeals' interpretation, have had to rewrite the statute: they read it as making applicable the provision that "results" (Br. in Opp. 14), "actually results" (*id.* at 11), or "will result" (*id.* at 8, 16) in the highest price. But the statute requires application of the provision that "could result" in the highest price. If Congress had wished to require a comparison of contract prices, "Congress could have phrased its requirement in language" like that suggested by the producer respondents, but "it did not choose this readily available option" (*Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, slip op. 6). Accordingly, Section 101(b)(5) must be read as referring to the range of legally permitted possibilities, not as determining which of several contract prices a producer must actually charge.

2. The court of appeals mistakenly concluded that the Commission's interpretation of the phrase "provision which could result" somehow rendered Section 101(b)(5) "meaningless" (Pet. App. 15a-16a). The categories of natural gas defined in Subtitle A of the NGPA overlap one another, and a rule is therefore required to determine where to place gas that is qualified in more than one category. Section 101(b)(5) furnishes the needed rule in a single sentence, encompassing all cases of dual-qualified gas—gas that falls into two regulated categories (regulated-regulated gas) and gas that falls simultaneously into regulated and deregulated categories (regulated-deregulated gas). The Commission's interpretation of Section 101(b)(5), far from rendering the provision meaningless, construes it as precisely specifying which category applies in every case—for regulated-regulated gas, the category with the higher ceiling; for regulated-deregulated gas, the deregulated category. Although the result of the

required comparison is always the same for regulated-deregulated gas, that is obviously not so for the regulated-regulated case. Section 101(b)(5) thus fulfills a necessary role in the NGPA under the Commission's reading.

Contrary to what the court of appeals thought, the Commission in no way reads Section 101(b)(5) as referring only to "theoretical possibilities" (Pet. App. 16a). Section 101(b)(5) does not require a comparison of what prices a producer might "theoretically" be able to charge depending on market conditions, the statutory inflation adjustments over time, or whether the Commission exercises its power to set special "just and reasonable" rates (Pet. App. 15a-16a). Section 101(b)(5) is not concerned with any such hypothetical situations either at a particular moment or over an indefinite period. It is concerned only with what the NGPA permits at a particular moment. Under Section 101(b)(5), as the Commission reads it, if two provisions apply to a given quantity of gas, the one that leaves producers free to contract to sell their gas at the higher price governs.

3. The court of appeals' view is inconsistent not only with the language of Section 101(b)(5) but with the approach to price regulation taken by Title I of the NGPA as a whole. See, *e.g.*, *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 18-19 (1981) (citation omitted) (particular provision should be construed in light of " 'the provisions of the whole law' "). Under the court of appeals' view, Section 101(b)(5) requires a comparison of the prices producers happened to include in their contracts, not simply of the ceilings applicable under the NGPA. But such a construction would be anomalous in a statute that otherwise deals only with the upper limit on any producer price.

As the Commission's view recognizes, the pricing provisions of Title I of the NGPA regulate only the maximum prices producers may charge and do not concern

themselves with producers' contract prices, as long as they do not exceed applicable legal ceilings. Thus, the price-regulation provisions of Subtitle A do not establish the prices that producers must charge; rather, in every provision, the statute is concerned solely with setting "maximum lawful prices" or "ceiling prices." Section 504(a), 15 U.S.C. 3414(a), reinforces what those statutory terms already make clear—that such prices are only upper limits, below which parties are free to set their prices: Section 504(a)(1) declares it unlawful "to sell natural gas at a first sale price in excess of any applicable maximum lawful price." The NGPA again underscores its exclusive concern with upper limits in Section 101(b)(9), 15 U.S.C. 3311(b)(9), which expressly declares that contract prices are enforceable as long as they are lower than any applicable statutory ceiling, and are always lawful if a price-deregulation provision applies.

Congress clearly sought to set only maximum prices and otherwise to leave the establishment of the prices producers would actually charge to private decision.[22] Indeed, in explaining Section 101(b)(9), the Conference Report states (H.R. Conf. Rep. 95-1752, *supra*, at 74): "The rule

[22] Congress's removal of ever-increasing amounts of natural gas from the reach of the Natural Gas Act (see NGPA § 601, 15 U.S.C. 3431) confirms this. For gas covered by the Natural Gas Act (NGA), producers must file their contract rates with the Commission and are forbidden to alter contract rates without complying with certain filing and waiting-period requirements; moreover, if the Commission finds a proposed rate unjust or unreasonable, the Commission fixes the actual rate. See NGA §§ 4, 5, 15 U.S.C. 717c, 717d; *FPC* v. *Texaco, Inc.*, 417 U.S. 380 (1974); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). The NGPA rejected these restrictions on producers' right to alter contracts and, with respect to the increasing quantities of gas removed from NGA jurisdiction, specified that, as far as the NGPA was concerned and subject to their contractual commitments, producers may freely change the price at which they sell gas as long as they do not exceed NGPA ceilings.

for application of ceiling prices pertains to maximum lawful prices. All maximum lawful prices are ceiling prices only." The explanatory statement prepared by the House conferees urging adoption of the conference bill likewise emphasized that the NGPA would not establish contract prices as such, but only restrict how high they could go: "The rule set forth in section 101(b)(9) is that the legislation establishes *ceiling* prices" (124 Cong. Rec. 38364 (1978) (emphasis in original)).[23] The court of appeals' reading of Section 101(b)(5) as dealing with the actual prices producers' contracts permit them to charge would render it a glaring anomaly in a statute otherwise pervasively concerned only with ceiling prices.

[23] In Section 105, 15 U.S.C. 3315, which applies to gas sold under intrastate contracts pre-dating the NGPA (or their successors), the statutory limit happens to depend on the contract terms. By its terms, however, the provision only sets a "maximum lawful price." Moreover, the provision, addressed to the distinctive transition problems of previously unregulated intrastate contracts' being brought under federal regulation, is clearly exceptional in the context of the NGPA. In any event, the key House conferees, recognizing that the coincidence of ceiling and contract prices is exceptional, stressed that the statute did not purport to address contract prices as such and that any interference with contracts was to be minimized: "The FERC is intended to play an enforcement role with respect to the ceiling prices, not with respect to enforcement of private contracts per se. * * * Of course, in some cases, for example under section 105, the statutory ceiling prices and contract prices will coincide. In those cases FERC's enforcement responsibilities under this legislation may require an inquiry regarding the meaning of contractual provisions. This inquiry is essential if FERC is to enforce the ceiling price where that price is based upon a contract between private parties. Nevertheless, it is contemplated that FERC's implementation of the bill will be accomplished with minimal interference with contractual relationships." 124 Cong. Rec. 38364 (1978).

B. The Overall Scheme And History Of The NGPA Preclude Permitting Producers To Select Regulated Treatment At A Higher Price For Gas That Is Qualified For Deregulated Treatment At A Lower Price

The error of the court of appeals' reading of Section 101(b)(5) is made especially clear by the results it produces when applied to gas that is qualified for both regulated and deregulated treatment. Under the court's reading, a producer could repeatedly switch back and forth between regulated and deregulated categories, perhaps daily, as the contract prices in those categories change with time and market conditions. A producer not only could return deregulated gas to regulated status but also could obtain a price higher than the deregulated (market) price. Such results would be contrary to the overall scheme Congress enacted in the NGPA and would afford producers more favorable treatment than anyone in Congress urged or contemplated, so much so as to be wholly outside the terms of the debate that led to the NGPA's enactment.

1. The clear overall scheme of the NGPA is one of "[p]hased deregulation" (124 Cong. Rec. 38361 (1978) (Rep. Dingell); *id.* at 29659 (Sen. Percy) ("the phased deregulation schedule * * * really is at the heart of this bill")). As shown by Section 601, 15 U.S.C. 3431, with its removal of increasing amounts of gas from the Commission's jurisdiction under the Natural Gas Act, and by Section 121, 15 U.S.C. 3331, with its three-stage plan for the elimination of price ceilings, the Act contemplates a transition to deregulation for an ever-increasing portion of the natural gas sold in this country (as "old" gas is replaced by "new" gas). The intended transition is reflected as well in Section 122, 15 U.S.C. 3332, which establishes only one method to call off deregulation (action by the President or Congress), and then only temporarily and only once. As the Conference Report states, Title I of the NGPA provides for the eventual "deregulation of most categories of

natural gas" (H.R. Conf. Rep. 95-1752, *supra*, at 68). See also 124 Cong. Rec. 28634 (1978) (Sen. Jackson) ("It is a phased deregulation bill which, in 1985, if it does not work, the Congress and the President retain the opportunity to continue price regulations for 18 months, if necessary."); *id.* at 28642 (Sen. Melcher) (bill "will work up gradually to a point of deregulation"), 28645 (Sen. Pearson) (bill "provides the process which will lead us ultimately to the deregulation of new natural gas pricing"), 28884 (Sen. Hart) (bill "eventually deregulates the price of natural gas"), 28886 (Sen. Hansen) (bill "says we will have deregulation 7 years away").

The court of appeals' reading of Section 101(b)(5) is inconsistent with this basic plan for the future of natural gas regulation. The court of appeals would permit a producer to return deregulated gas to regulated status. It would also permit producers to switch back and forth between deregulated and regulated status, with no apparent limitation, as market prices rise or fall.[24] Nothing in the NGPA itself or in the legislative history of the Act contemplates either the peculiar system of (perhaps daily) category changes or the return to regulation of gas that has once been released from price regulation. To the contrary, such results would interfere with the gradual substitution of market controls for regulatory controls that Congress envisioned.

Under the court of appeals' reading, the future of natural gas regulation would follow a policy quite different from the deregulation policy established by Congress. The court of appeals' decision establishes a uniform and permanent producer-assistance policy, always affording producers the highest possible price, even when

[24] The potential for return of deregulated gas to regulated status is a continuing one, because some deregulated "new" gas (under §§ 102 and 103, 15 U.S.C. 3312, 3313) will always become regulated "stripper well" gas (under § 108, 15 U.S.C. 3318) as the well diminishes in production.

market forces set a lower price. But while the (mostly) temporary incentive-price provisions of the NGPA certainly were intended to spur production, the deregulation policy that has now been phased-in for most categories of gas – like any system for allowing market forces to determine price – is not intended single-mindedly to favor producers or production.

The NGPA deregulation policy resulted from Congress's belief, as this Court recognized in *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. at 424 (footnote omitted), that "direct federal price control exacerbated supply and demand problems by preventing the market from making long-term adjustments." To the extent that Congress deregulated "particular aspects of the first sale of gas, it did so because [after the specified phase-in periods] it wanted to leave determination of supply and first-sale price to the market" (*id.* at 422). Allowing "long-term adjustments" in supply and demand to be made by the operation of market forces is not a policy that, in intent or effect, uniformly favors producers or increases production.

A market policy always carries the possibility, as one of its natural consequences, that prices and production may decrease at particular times – for example, as the costs diminish for alternative fuels such as oil and coal. Indeed, proponents of deregulation in Congress made just this point in arguing, in response to their opponents' principal contention, that deregulation would not result in excessively high prices or revenues for producers. See, *e.g.*, 123 Cong. Rec. 26455 (1977) (Rep. Stockman); *id.* at 29783 (Sen. Hansen), 29784 (Sen. Bartlett), 29931 (Sen. Johnston), 31252 (Sen. Stevens); 124 Cong. Rec. 28877 (1978) (Sen. Weicker) ("the price under total deregulation in a free market, can go down if the supply is too great"); *id.* at 28882 (Sen. Bumpers), 29103 (Sen. Bellmon).[25]

[25] Senator Stevens explained (123 Cong. Rec. 31252 (1977)): "The argument for deregulation is straightforward and simple. Market prices for natural gas should prevail for the same reason the market sets most prices in our society. Producers have an incentive to find the lowest cost supplies and sell to all consumers who find the product at the market price more valuable than their alternatives. * * * If demand slackens, producers will drop their higher cost production, and restrain prices, until balance is again achieved.

"We argue that the same thing will happen with natural gas. With deregulation, prices may well rise above the controlled levels. More supplies will be produced. Consumers who have lower cost alternatives will switch, thus freeing additional supplies, and helping to moderate the price rise."

This obvious aspect of the working of a policy of deregulation, as applied in circumstances like those prevailing in the market today, is simply incompatible with the producer-assistance policy adopted by the court of appeals.

2. The producer-assistance policy that results from the court of appeals' view of Section 101(b)(5) is not merely incompatible with the plan of phased deregulation that Congress adopted. By allowing producers to receive higher prices than market forces would establish, the court of appeals has read the NGPA as affording producers more favorable treatment than any participant in the debate leading up to the enactment of the NGPA supported. It is inconceivable that the Congress that enacted the NGPA would have passed a statute that enabled producers to receive higher than market prices.

As we demonstrated above (pages 4-7, *supra*), the natural gas pricing scheme adopted by Congress was a compromise between "two strong, but divergent, responses to the natural gas shortage" (*Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. at 331), with one predominating by a slim margin in the Senate, the other by a slim margin in the House. See also H.R. Conf. Rep. 95-1752, *supra*, at 68 ("compromise"); 124 Cong. Rec. 38361 (1978) (Rep. Dingell) ("compromise"); *id.* at

29404 (Sen. Byrd) ("compromise").[26] In both the 94th and 95th Congresses, the debate over natural gas legislation took place along a spectrum—at one end were those supporting some form of deregulation; at the other were those supporting the extension into intrastate markets of some form of federal price ceilings. See H.R. Rep. 95-543, *supra*, at 391-392; 124 Cong. Rec. 28634-28635 (1978) (Sen. Jackson); 123 Cong. Rec. 30741-30742 (1977) (Congressional Research Service memorandum). The first group, which predominated in the Senate and was led by Senators from the gas-producing states, reflected a range of views about when and what kinds of gas should be deregulated. See, *e.g.*, 121 Cong. Rec. 30735-30737 (1975) (Sens. Bartlett and Long); *id.* at 30739 (Sen. Taft), 30908 (Sen. Bentsen), 30914 (Sen. Tunney), 31250 (Sens. Packwood and Scott); 123 Cong. Rec. 25897 (1977) (Rep. Anderson); *id.* at 25936 (Rep. Hightower), 25938-25940 (Rep. Kemp), 29781 (Sen. Hansen), 29927 (Sen. Bartlett), 29784-29786 (Sen. Pearson), 30186-30187 (Sen. Bentsen); 124 Cong. Rec. 28635 (1978) (Sen. Bartlett); *id.* at 28881 (Sen. Weicker). The second group, which predominated in the House, reflected a range of views about what changes, if any, should be made in the level of federal price ceilings. See, *e.g.*, 121 Cong. Rec. 30902-30903 (1975) (Sen. Hollings); 122 Cong. Rec. 2387-2388 (1976) (Rep. Smith);

[26] The Conference Committee adopted elements of both the Senate and House bills, bringing intrastate gas under control (as the House but not the Senate proposed), phasing in deregulation of "most categories of natural gas" (H.R. Conf. Rep. 95-1752, *supra*, at 68) (as the Senate but not the House proposed), but lengthening the periods proposed by the Senate for the phasing in of deregulation. On the compromise nature of the bill, see Allison, *Natural Gas Pricing: The Eternal Debate*, 37 Baylor L. Rev. 1, 37 (1985); Pierce, *Natural Gas Regulation, Deregulation, and Contracts*, 68 Va. L. Rev. 63, 89 (1982); Moody & Garten, *The Natural Gas Policy Act of 1978: Analysis and Overview*, 25 Rocky Mtn. Min. L. Inst. 2-39, 40 (1979).

H.R. Rep. 95-543, *supra*, at 391-397; 123 Cong. Rec. 25894 (1977) (Rep. Ashley); *id.* at 25898 (Rep. Dingell); S. Rep. 95-436, *supra*, at 2-5, 15-16, 42-43 (Sen. Abourezk), 45-46 (Sen. Bumpers), 47-49 (Sen. Metzenbaum); 123 Cong. Rec. 29925-29926 (1977) (Sen. Metzenbaum); 124 Cong. Rec. 28637 (1978) (Sen. Metzenbaum); *id.* at 28648 (Sen. Proxmire).

No one among those supporting deregulation, however, even remotely suggested that producers should receive higher than market prices. Indeed, such a suggestion would have been contrary to their key argument that the market was the right mechanism to determine prices and to induce sufficient production. See, *e.g.*, 121 Cong. Rec. 30735-30737 (1975) (Sens. Bartlett and Long); *id.* at 30908 (Sen. Bentsen), 31223 (Sen. Fannin), 31250 (Sen. Packwood), 31358-31359 (Sen. Stevens), 31988-31992 (Sen. Gravel); 123 Cong. Rec. 25923 (1977) (Rep. Edwards); *id.* at 25926 (Rep. Krueger), 25932 (Rep. Ichord), 26458 (Rep. Symms), 26460 (Rep. Archer), 26467 (Rep. Watkins), 29781-29782 (Sen. Hansen), 30373 (Sen. Pearson), 30388-30390 (Sen. Percy), 31252 (Sen. Stevens), 31774-31775 (Sen. Goldwater). Those on the other side of the debate would have found such a suggestion even more objectionable. They opposed deregulation, and sought to impose price ceilings, because they believed that deregulation itself would be too favorable to producers—would create "windfall profits" and raise prices excessively. See, *e.g.*, 121 Cong. Rec. 31215-31218 (1975) (Sen. Hollings); *id.* at 31803 (Sen. Stevenson); H.R. Rep. 95-543, *supra*, at 391; 123 Cong. Rec. 25894 (1977) (Rep. Ashley); *id.* at 25916 (Rep. Ottinger), 26453 (Rep. Ashley), 29780 (Sen. Jackson); S. Rep. 95-436, *supra*, at 20, 39 (Sen. Jackson), 45-46 (Sen. Bumpers), 47-49 (Sen. Metzenbaum). The proponents of deregulation took pains to respond to that critical objection by arguing that deregulation would, while raising prices, not do so excessively and, indeed,

would eventually moderate prices by imposing market discipline on gas producers. See sources cited page 30, *supra*; see also 121 Cong. Rec. 30930 (1975) (Sen. Fannin); 123 Cong. Rec. 26453 (1977) (Rep. Brown); *id.* at 26457 (Rep. Ketchum), 29783 (Sen. Hansen), 29784 (Sen. Bartlett), 30188 (Sen. Bentsen), 30379 (Sen. Domenici), 31251 (Sen. Stevens), 31572 (Sen. Weicker). Finally, central to the arguments made by the supporters of the conference agreement were the beliefs that the agreement would not result in windfall profits and that the gradually increasing ceiling prices established by the bill would cushion the shock of the eventual jump up to still-higher deregulated prices. See, *e.g.*, 124 Cong. Rec. 28632 (1978) (Sen. Jackson); *id.* at 28642 (Sen. Melcher), 28883-28884 (Sen. Hart), 38361-38362 (Rep. Dingell).[27]

In these circumstances, it would have been unthinkable to suggest that producers should receive more than market forces would give them. Such higher-than-market prices would almost by definition have been deemed just the sort of windfall profits that no one in the debate suggested producers deserved. And the history of the NGPA makes crystal clear that all participants in the legislative process understood — as Senator Jackson, the Senate floor manager, said in explaining why the "very important" high-cost gas under Section 107(c)(1)-(4), 15 U.S.C. 3317(c)(1)-(4), was deregulated within one year — that deregulation provided "the maximum economic incentive" (124 Cong. Rec. 28633 (1978)) that anyone in Congress was considering. See also 124 Cong. Rec. 38361 (1978) (Rep. Dingell) ("The deregulation provisions provide the incentives required for producers.").

[27] Representative Dingell, the floor manager of the conference bill in the House, explained that, although he had opposed immediate deregulation for fear of its harsh consequences to consumers and potential for windfall profits, "[p]hased deregulation as set forth in the conference report avoids both of these objectionable results" (124 Cong. Rec. 38361 (1978)).

In short, deregulation was the most favorable position for producers even being discussed.[28] To permit producers higher than market prices, as would the court of appeals' ruling, would be to adopt a position that lies wholly outside the spectrum within which the debate in Congress took place. That reading of the Act is one that not only Congress as a whole but, in fact, both sides of the debate would have rejected.

3. The court of appeals erred in finding (Pet. App. 18a-22a) that its ruling was supported by a congressional commitment to the principle of producer choice. The court read the NGPA as granting producers an indefeasible right to choose, from among the available pricing categories, those in which they would seek qualification from the relevant state or federal jurisdictional agency. But that proposition, which we believe is incorrect[29] and is of only minor importance,[30] is irrelevant to the Commis-

[28] Several of the opponents of deregulation expressly identifed the deregulation side of the debate as representing the producers' interests. See, *e.g.*, 121 Cong. Rec. 31211 (1975) (Sen. Hollings) (producers sought deregulation in 1950 and 1956 and are now trying again); 123 Cong. Rec. 26482 (1977) (Speaker O'Neill).

[29] In our view, nothing in Section 503, 15 U.S.C. 3413, which provides for administrative determinations of the proper category of natural gas, grants producers the indefeasible right to select one of two applicable categories. The authority of the Commission to promulgate regulations under Sections 501(a) and (b) and 503(b), 15 U.S.C. 3411(a) and (b), 3413(b), should encompass the authority to direct that gas that in fact falls into a deregulated as well as a regulated category be treated as deregulated. Such an action would be consistent with the overall aims and the specific history of the NGPA, as discussed above, and would also serve the purpose of simplifying the administration of the Act, which was the subject of considerable congressional concern. See sources cited at pages 37-38, *infra*.

[30] If this Court reverses the Tenth Circuit's decision overturning the Commission's ruling that most new tight formation gas under Section 107(c)(5), 15 U.S.C. 3317(c)(5), is automatically qualified under Section 102 or 103, 15 U.S.C. 3312, 3313, it should be a rare case where

sion's dual-qualification ruling. The Commission's ruling applies only to gas that has already been dually qualified in both regulated and deregulated categories. Whether that ruling is correct presents a quite different question from whether producers have an unqualified right to decline in the first place to seek or accept jurisdictional-agency qualification in particular categories. However that question is answered, the NGPA embodies no principle of producer choice that permits a producer to place gas that is already qualified for deregulated treatment into a regulated category with a higher than market price.

The language of Section 101(b)(5) itself is contrary to the suggested principle, since that provision declares what price provisions govern; it does not give producers any choice in the matter. Moreover, and perhaps most important, such a principle would give producers a more favorable position — enabling them to opt in and out of the operation of the market — than anyone in the legislative process contemplated (see pages 31-35, *supra*). And allowing producers, indefinitely into the future, to choose regulated pricing rather than market prices would be inconsistent with the congressional policy of phased deregulation.

The court of appeals pointed (Pet. App. 19a, 21a-22a, n.15) to several statements in the legislative history to support its conclusion. In fact, the legislative history does not

gas that qualifies for regulated status has not also been qualified for a deregulated status for which it is eligible. Aside from Section 107(c)(5) gas, most of which the Commission's rule would automatically qualify for deregulated status, the only regulated gas that presents a significant potential problem of overlap with deregulated gas is stripper-well gas qualified under Section 108, 15 U.S.C. 3318. Almost all such gas that could be qualified under Section 102 or 103, however, will in fact have been so qualified before the well's production diminishes and the gas becomes eligible for Section 108 status.

provide the necessary support. First, as the court of appeals recognized (*id.* at 21a n.15), the statements in the legislative history that address the subject of gas that could qualify for two different kinds of treatment point in opposite directions. Several statements might suggest an intent that dual-qualified regulated-deregulated gas would be deregulated.[31] Further, the two statements centrally relied on by the court of appeals — the explanatory statement of the key House conferees led by Representative Dingell (Pet. App. 19a, quoting 124 Cong. Rec. 38363-38364 (1978)) and the statement of Senator Jackson (Pet. App. 19a, quoting 124 Cong. Rec. 29109 (1978)) — do not state that producers can opt out of a deregulated qualification they have already obtained. Rather, the statements are concerned with the wholly distinct issue (see pages 35-36, *supra*) of the awarding and seeking of qualifications in the first instance. Even on that issue, moreover, the statements are specifically addressed only to the repeatedly expressed concerns about the potential administrative burdens that the NGPA, because of its complexity, would place on the agencies that determine the classification of natural gas (124 Cong. Rec. 28651 (1978) (Sens. Proxmire and Abourezk); *id.* at 28875 (Sen. Weicker), 29386 (Sen. Reigle), 29665-29669 (Sen. Abourezk, and comments of FERC chairman), 30038 (Sen. Melcher, citing FERC staff analysis), 38352-38354

[31] Senator Bartlett stated (124 Cong. Rec. 31387 (1978)): "[I]n informal discussions on the floor it has been asserted that stripper wells are deregulated. This is true only to the extent that such wells are otherwise new wells and would be deregulated anyway." And the key House conferees, led by Representative Dingell, explained (124 Cong. Rec. 38364 (1978)) that obtaining two qualifications for new gas from a stripper well "would permit the producer to obtain stripper well pricing under section 108 prior to January 1, 1985, and deregulation as new gas thereafter." See Pet. App. 21a n.15.

(Rep. Anderson), 38355-38358 (FERC staff analysis)); and they merely affirm that it is up to producers to seek particular qualifications, so that the agencies have no statutory obligation to search through all possible classifications, demand all potentially relevant information from producers, and independently determine the proper category. Indeed, it is hard to imagine that Representative Dingell and Senator Jackson, both of whom came to the conference compromise from the side of the debate that opposed deregulation as too costly (123 Cong. Rec. 26454 (1977) (Rep. Dingell); 124 Cong. Rec. 38361 (1978) (Rep. Dingell); S. Rep. 95-436, *supra,* at 39 (Sen. Jackson); 123 Cong. Rec. 29780 (1977) (Sen. Jackson)), would have meant or been understood to suggest that producers could invoke the mechanisms of the NGPA to opt out of deregulation and to obtain higher than market prices.[32]

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[32] The court of appeals also cited (Pet. App. 22a n.15) a statement in the Conference Report that "natural gas qualifying as gas produced from a natural gas stripper well * * * [could be] sold subject to the provisions of sec. 108, rather than taking deregulated treatment as an existing intrastate contract" (H.R. Conf. Rep. 95-1752, *supra,* at 83). That statement, however, is not an explanation of Section 101(b)(5) at all. It appears in the portion of the conference report that discusses Section 105, 15 U.S.C. 3315, and it explains a singular limitation on deregulation set by Section 121(e), 15 U.S.C. 3331(e), for certain Section 105 gas. Under Section 121(e), such gas, which would otherwise be deregulated under Section 121(a), 15 U.S.C. 3331(a), is instead subjected to a ceiling that limits certain price-escalation clauses in producers' contracts (see NGPA § 105(b)(3), 15 U.S.C. 3315(b)(3)). Accordingly, the statement cited by the court of appeals is in fact addressed to an overlap of two regulated categories (§ 108, 15 U.S.C. 3318, and § 105(b)(3), 15 U.S.C. 3315(b)(3)), not to the overlap of a regulated and a deregulated category. (The court of appeals discussed the operation of Sections 105(b)(3), 121(a), and 121(e) elsewhere in its opinion. See Pet. App. 25a-28a.)

Indeed, the provision that the Conference Report statement explains, Section 121(e), supports the Commission's ruling here. In that provision, as in Section 101(b)(5), Congress addressed itself to dual-

C. Deference Is Due To The Commission's Construction Of The NGPA

For all of the above reasons, the court of appeals' decision is erroneous. It creates a bizarre system of natural gas regulation (permitting repeated transfers of natural gas in and out of regulation) that is contrary to the language, history, and overall scheme of the NGPA. That conclusion is compelled using the "traditional tools of statutory construction" (*INS* v. *Cardoza-Fonseca,* No. 85-782 (Mar. 9, 1987), slip op. 24-25), independent of any deference to the Commission.

Even if the statutory meaning were less than crystal clear, however, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation by the * * * agency" that is entrusted with administration of the statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844 (1984) (footnote omitted). See also *Clarke* v. *Securities Industry Ass'n,* No. 85-971 (Jan. 14, 1987), slip op. 14-15; *Japan Whaling Ass'n* v. *American Cetacean Society,* No. 85- 954 (June 30, 1986), slip op. 11; *Young* v. *Community Nutrition Institute,* No. 85-664 (June 17, 1986), slip op. 5-7. The Commission is entitled to deference in these cases because the NGPA entrusted the Commission with the "responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly" (*Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315 (1933)). See NGPA § 501, 15 U.S.C. 3411 (granting Commission broad power to carry out the provisions of the

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qualified gas. And Congress specifically provided there that, whenever the regulated category (§ 105(b)(3)) overlapped with a deregulated category (§§ 102, 103, 107(c)(1)-(4), 15 U.S.C. 3312, 3313, 3317(c)(1)-(4)), the deregulated category would be applicable.

NGPA); H.R. Conf. Rep. 95-1752, *supra*, at 69, 116; *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. at 339. Deference is especially appropriate where, as here, there has been no inconsistency in the agency rulings and "a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters" at issue (*United States* v. *Shimer*, 367 U.S. 374, 382 (1961)). See *INS* v. *Cardoza-Fonseca*, slip op. 23-26; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 837-843. Because the Commission's view that dual-qualified regulated-deregulated gas is deregulated under the NGPA is unquestionably reasonable,[33] it should be upheld.

II. THE COMMISSION PROPERLY RULED THAT MOST NEW TIGHT FORMATION GAS IS AUTOMATICALLY QUALIFIED FOR DEREGULATED TREATMENT

The court of appeals overturned (Pet. App. 18a-19a) the Commission's ruling that most "new tight formation" gas under Section 107(c)(5), 15 U.S.C. 3317(c)(5), is automatically qualified under Section 102(c) or 103, 15 U.S.C. 3312(c), 3313, and hence deregulated, even if the state or federal jurisdictional agency that awards the Section 107(c)(5) qualification does not expressly state that the gas is also being qualified under Section 102 or 103.

[33] Indeed, in comments filed in 1979 in a related rulemaking proceeding (a copy of which has been lodged with the clerk of this Court), respondent Phillips Petroleum Company, among other producers, interpreted the NGPA to require the same result as that reached by the Commission in this proceeding. It stated that Section 121 of the NGPA, 15 U.S.C. 3331, without regard to Section 101(b)(5), required deregulation for all gas in the listed categories, regardless of whether the gas also fell within a regulated category and regardless of whether the regulated or deregulated price was higher. See FERC, *Joint Comments of Indicated Producers* B-11 to B-12 (Oct. 26, 1975). The same comments, we note, also adopted the Commission's position on the question of deregulation of new tight formation gas (*ibid.*).

The court of appeals reached this decision in the course of explaining its broader dual-qualification holding, without distinctly separating the Section 107(c)(5) issue in its discussion. Although the court later modified its initial opinion by expressly noting (Pet. App. 30a) that the Commission has authority to define what gas qualifies under Section 107(c)(5), the court of appeals erred in striking down the Commission's ruling on new tight formation gas.

The Commission has broad authority under Section 501, 15 U.S.C. 3411, "to issue rules and orders under the Act, and to perform any and all acts as it may find necessary or appropriate to carry out the provisions of [the] Act" (H.R. Conf. Rep. 95-1752, *supra*, at 116). That authority encompasses the power "to issue rules and orders necessary to prevent circumvention of the Act" (*ibid.*) as well as the power "to refine definitions of terms provided in the Act in a manner that is consistent with the definitions provided" (*id.* at 69) and to define additional terms (*id.* at 69, 116). See also 124 Cong. Rec. 29109 (1978) (Sen. Jackson). Also, under Section 503, 15 U.S.C. 3413, the Commission is charged with reviewing the qualification determinations of the jurisdictional agencies and is authorized (§ 503(a)(2), 15 U.S.C. 3413(a)(2)) to prescribe in what manner and with what substantiation such determinations must be presented for review. In addition, and more particularly, as the court of appeals recognized in modifying its decision, the Commission is granted the authority to determine what categories of gas "present extraordinary risks or costs" so as to deserve the special pricing of high-cost gas under Section 107(c)(5), 15 U.S.C. 3317(c)(5).

The Commission's ruling on new tight formation gas is an eminently reasonable exercise of its regulatory authority. The definition of "new tight formation" gas states that, with the exception of certain Outer Continental Shelf gas, such gas "is" new gas under Section 102(c) or 103 (18

C.F.R. 271.703(b)). When a producer applies for qualification of certain gas under that definition, all the information required for Section 102 or 103 qualification must be supplied (18 C.F.R. 274.205(e)(1)(i)(A) and (B)), and a determination that the gas is new tight formation gas is necessarily a determination that the gas "is" Section 102 or 103 gas.[34] The Commission merely ruled that the jurisdictional agencies must give effect to that definition by announcing the necessarily implied designation under Section 102 or 103 when they announce the Section 107(c)(5) designation. This ruling reasonably serves to simplify the operation of the NGPA and to prevent circumvention of the statute and of the Commission's definitional rules properly implementing Section 107(c)(5).

Moreover, the ruling is in all relevant respects identical to a Commission decision simply to exclude from the definition of new tight formation gas under Section 107(c)(5) all gas that meets the requirements for qualification under Section 102 or 103. At least now that the latter categories have been deregulated, such a decision would be entirely proper. As we have explained (pages 31-35, *supra*), Congress understood deregulation to be "the maximum economic incentive" provided by the statute (124 Cong. Rec. 28633 (1978)) (Sen. Jackson, explaining Section 107(c)(1)-(4)). It would be, at a minimum, in tension with that understanding for the Commission to use its Section 107(c)(5) definitional authority to grant producers higher prices than market forces would justify. Because a change in the definition of new tight formation gas would accordingly be proper, as the court of appeals may have recognized in modifying its opinion, the Commission's

[34] Indeed, in order to be "new natural gas" under Section 102(c), 15 U.S.C. 3312(c), the gas must be "determined in accordance with section 503" (*ibid.*) by a jurisdictional agency to meet the specified requirements.

Section 107(c)(5) ruling in this proceeding should be upheld.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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